

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )

BEFORE THE CHIEF PROCUREMENT OFFICER

In the Matter of Protest of: )

DECISION

Palmetto Mortuary Transport, Inc. )

CASE No. 2009-146

University of South Carolina )

POSTING DATE:

IFB No. USC-IFB-1578-RB )

Cadaver Transportation & Preparation )

For the USC Medical School )

January 15, 2010

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest from Palmetto Mortuary Transport, Inc. (Palmetto). With this invitation for bids (IFB), the University of South Carolina (USC) attempts to procure cadaver transportation and preparation for the USC School of Medicine Gift of Body Program. Following the solicitation, USC posted a notice of intent to award to Capitol Transportation (Capitol). In the letter, Palmetto protested USC's intent to award alleging "the inability to consider Capitol Transportation as responsible with regard to their ability to meet the requirements specified in the USC Invitation to Bid" and "[u]sing lowest price rather than best value as the award criteria."

In order to resolve the matter, the CPO conducted a hearing January 5, 2010. Appearing before the CPO were Palmetto, represented by Jack Pringle, Esq.; Capitol, represented by Archie Maddox, Owner; and USC, represented by George Lampl, Esq.

#### **NATURE OF PROTEST**

The letter of protest is attached and incorporated herein by reference.

## **FINDINGS OF FACT**

The following dates are relevant to the protest:

1. On October 8, 2009, USC issued its IFB. [Ex. 2]
2. On October 22 2009, USC closed the period allowed for offeror questions.
3. On October 28, 2009, USC opened the following bids:

<u>Bidder</u>	<u>Bid Amount</u>
Capitol	\$50,375
Palmetto	52,000

[Ex. 4]

4. On November 3, 2009, USC posted its intent to award to Capitol. [Ex. 6]
5. On November 13, 2009, the CPO received Palmetto's protest.

## **CONCLUSIONS OF LAW**

Palmetto protested in allegation #2, USC's "[u]sing lowest price rather than best value as the award criteria." USC offered a motion asking the CPO to dismiss this allegation as untimely filed. The motion is granted. USC released the solicitation on October 8, 2009 identifying the procurement as an invitation for bids, not a best value bid. [Ex. 2, p. 1] Regarding award, the IFB read, "Award will be made to the lowest responsible and responsive bidder(s)." [Ex. 2, p. 10, Award Criteria] Palmetto did not file a protest of the solicitation, but rather of the award, on November 13, 2009.

Regarding a protest of a solicitation, the Consolidated Procurement Code (Code) reads, "A prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the solicitation of a contract shall protest to the appropriate chief procurement officer in the manner stated in subsection (2)(a) within fifteen days of the date of issuance of the Invitation For Bids or Requests for Proposals or other solicitation documents, whichever is applicable, or any amendment to it, if the

amendment is at issue. An Invitation for Bids or Request for Proposals or other solicitation document, not including an amendment to it, is considered to have been issued on the date required notice of the issuance is given in accordance with this code.” [11-35-4210(1)(A)] No amendments were issued. Therefore, a protest of USC’s use of an invitation for bids would have to have been filed within fifteen days of October 8, 2009. Palmetto’s filing of November 13, 2009 was not within the time limit allowed to protest the solicitation. Consequently, Palmetto’s protest of USC’s use of an invitation for bids instead of a best value bid was untimely filed.

Palmetto protested in allegation #1, “The inability to consider Capitol Transportation as responsible with regard to their ability to meet the requirements specified in the USC Invitation to Bid.” As noted above, USC’s IFB read that – consistent with the law – award would be made to the lowest responsible and responsive bidder. Regarding the qualifications required of bidders, USC’s IFB read, “Contractor must be experienced in professional, discreet removal of human remains from the point of death, whether home, or other, and must also have a detailed knowledge of cadaver preparation (embalming and storage).”<sup>1</sup> [Ex. 2, p. 8, Scope of Work/Specifications]

The requirement for award was drafted directly from the Code, which reads “notice of an award or an intended award of a contract to the lowest responsive and responsible bidders whose bid meets the requirements set forth in the invitation for bids must be given by posting the notice at a location specified in the invitation for bids.” [11-35-1520(10)] The Code defines a responsible bidder as, “a person who has the capability in all respects to perform fully the contract requirements and the integrity and reliability which will assure good faith performance which may be substantiated by past performance.” [11-35-1410(6)] The Code imposes a duty upon the state to determine a bidder’s responsibility prior to award. It reads, “Responsibility of the bidder or offeror shall be ascertained for

each contract let by the State based upon full disclosure to the procurement officer concerning capacity to meet the terms of the contracts and based upon past record of performance for similar contracts.”

[11-35-1810(10)]

Regarding his determination of Capitol’s responsibility, Reed Bickers, USC Procurement Officer, testified that he determined Capitol’s bid responsiveness to the requirements of the IFB. He stated that he asked Capitol for no additional information regarding its responsibility, but rather relied on the specification for training in USC’s methods for embalming. The IFB read, “All Contractor personnel engaged in preparation must meet USC/SOM standards for training and assessing quality of preparation.” [Ex. 2, p. 8, Scope of Work/Specifications] However, this requirement regarded USC’s School of Medicine’s training of contractor personnel after award, not prior to award.

Mr. Bickers testified that he had no prior knowledge of Capitol. Yet, Mr. Bickers stated that he asked for no information from Capitol with which he would determine Capitol’s responsibility. He stated, “With the activity going across my desk, it would be impossible to do so.”

### **DETERMINATION**

Palmetto alleged Capitol was not a responsible bidder. However, the CPO does not decide whether a bidder is responsible; rather, the CPO determines whether the procurement officer’s determination of responsibility is “clearly erroneous, arbitrary, capricious, or contrary to law”. Section 11-35-1524. *See, generally, Protest of Value Options*, Case No. 2001-7 (“Responsibility determinations are of necessity a matter of business judgment and such judgment must, of course, be based on fact and reached in good faith.”) (*quoting News Printing Co., Inc. v. U.S.*, 46 Fed. Cl. 740

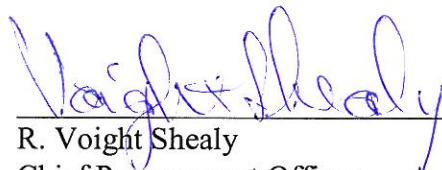
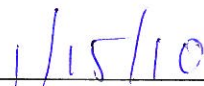
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<sup>1</sup> The CPO heard no argument and offers no opinion regarding whether this language establishes a special standard of responsibility. R. 19-445.2125(F). The CPO reminds procurement officers to carefully craft any language they use regarding

(2000)). Accordingly, the issue before the CPO is Mr. Bickers' determination, which must have some rational basis.<sup>2</sup>

The very act of awarding a contract necessarily amounts to a determination of responsibility. However, in this case, and in spite of the Code's requirement that in all cases the procurement officer must determine a bidder's responsibility prior to award, Mr. Bickers admitted that he did nothing to determine the responsibility of Capitol thereby violating a clear and established requirement of the Code. Consequently, the protest is granted and the award to Capitol is canceled. In canceling the award, the CPO is in no way deciding whether or not Capitol is responsible. USC must make that decision.

With the award canceled, USC still has an un-awarded procurement pending. USC may proceed in any manner allowed by the Procurement Code, which may include making an award to the lowest responsive and responsible offeror.

  
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R. Voight Shealy  
Chief Procurement Officer  
for Supplies and Services  
  
  
\_\_\_\_\_  
Date

Columbia, S.C.

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qualifications a contractor must have.

<sup>2</sup> See Steven W. Feldman, *Government Contract Awards: Negotiation and Sealed Bidding* § 18:9 (2009) (discussing challenges to affirmative determinations of responsibility).

## STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

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Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: [www.procurementlaw.sc.gov](http://www.procurementlaw.sc.gov)

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 83.1 of the 2009-2010 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410(4). . . . Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2008 S.C. Act No. 23, Part IB, § 83.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).

REC'D: BID CONTROL  
NOV 13 09 12 34 9AM

# PALMETTO MORTUARY TRANSPORT INC.

November 12, 2009

Chief Procurement Officer  
Materials Management Office  
1201 Main Street, Suite 600  
Columbia, SC 29201

Re: Solicitation Number: USC-IFB-1578-RB

I wish to exercise my right to protest the Intent to Award of Solicitation Number: USC-IFB-1578-RB dated November 3, 2009 which was awarded to Capitol Transportation. This contract provides cadaver transportation & preparation for The University of South Carolina School of Medicine. I am basing my protest upon the following grounds:

1. The inability to consider Capital Transportation as responsible with regard to their ability to meet the requirements specified in the USC Invitation to Bid.
2. Using lowest price rather than best value as the award criteria.

Please note the highlighted excerpts below from the Invitation to Bid:

### III. SCOPE OF WORK / SPECIFICATIONS

A. Contractor must be experienced in professional, discreet removal of human remains from the point of death, whether home, hospital, or other, and must also have detailed knowledge of medical cadaver preparation (embalming and storage). All preparation (embalming) must be done at the USC School of Medicine Morgue Facility, 6439 Garners Ferry Rd. Building #1, Columbia, SC 29209.

### V. QUALIFICATIONS

QUALIFICATION OF OFFEROR (JANUARY 2006): To be eligible for award of a contract, a prospective contractor must be responsible. In evaluating an Offeror's responsibility, the State Standards of Responsibility [R.19-445.2125] and information from any other source may be considered. An Offeror must, upon request of the State, furnish satisfactory evidence of its ability to meet all contractual requirements. Unreasonable failure to supply information promptly in connection with a responsibility inquiry may be grounds for determining that you are ineligible to receive an award. S.C. Code Section 11-35-1810.

### VI. AWARD CRITERIA

AWARD CRITERIA – BIDS (JANUARY 2006): Award will be made to the lowest responsible and responsive bidder(s).

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To support my position to protest I reference the following section from the SC Code of Laws:

**SECTION 11-35-1410.** Definitions of terms used in this article.

6) "Responsible bidder or offeror" means a person who has the capability in all respects to perform fully the contract requirements and the integrity and reliability which will assure good faith performance which may be substantiated by past performance.

What proof of past performance of medical cadaver preparation could Capitol Transportation provide to substantiate their eligibility and deemed responsible for consideration of the award? If the request for bidder qualifications was made prior to solicitation of bids would they have met the criteria required?

Medical cadaver preparation differs greatly from than preparation or embalming for funeral home applications. In medical cadaver preparation the first priority is for long term preservation not presentation. It requires a different skill set and understanding to achieve the desired results. Steps in the process are not the same as in a funeral home embalming. Even a person who has a strong embalming background can not claim to possess a detailed knowledge of medical cadaver preparation if they have not personally experienced and performed the procedures.

I came to the University Gift of Body Program with an extensive embalming background having worked as a funeral director and embalmer for 30 years prior, yet I needed and was required by Dr. Lance Paulman to be trained by my predecessor on multiple cadavers before being approved to prepare a cadaver on my own. Without this approval there was no guarantee that I would be able to retain the contract. This was to assure I was capable of meeting the USC /SOM standards of training and assessing the quality of preparation. The time involved to accomplish this was in excess of 25 hours in the preparation room. Acquiring a detailed understanding of the conditions that will occur is essential as no two cases are identical. Gaining the knowledge required can only come from hand on experience.

The risk of improperly preparing a cadaver making it unusable is too costly to not be taken into consideration. The potential for lost cadavers due to lack of experience is higher than the \$1625 annual difference of the bids. For example: the tangible cost of transportation, preparation and cremation (with no USC professional and administrative costs included) for two unusable cadavers due to poor preparation exceeds the annual bid difference by more than 25%. Is it worth the risk to select lowest price over proven qualified value?

The bids submitted proved to be very comparable in price (3.2% difference). Cost reductions for the state should be a goal for all contract awards but higher consideration should be given to what best serves as the best value. Contracts such as cadaver transportation and preparation services need to go beyond the best price wins decision due to the specialized skills involved. Qualifications, past performance and the preferences of the department utilizing the services should also weigh into the final decision.

The SC State Code of Laws provides the means to make purchasing decisions based on more factors than price. Below are excerpts of the applicable factors from the section.

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**SECTION 11-35-1528. Competitive best value bidding.**

1) Conditions for Use. When a purchasing agency determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the State, a contract may be entered into by competitive best value bidding subject to the provisions of Section 11-35-1520 and the ensuing regulations, unless otherwise provided for in this section.

(2) Best Value Bidding. The purpose of best value bidding is to allow factors other than price to be considered in the determination of award for specific supplies, services, or information technology based on pre-determined criteria identified by the State.

(5) Evaluation Factors.

b) quality of the product or service or its technical competency;

i) industry and program experience;

(j) prior record of vendor performance;

(k) vendor expertise with engagement of similar scope and complexity;

8) Award. Award must be made to the responsive and responsible bidder whose bid is determined, in writing, to be most advantageous to the State, taking into consideration all evaluation factors set forth in the best value bid.

The competitive best value bidding criteria is better suited for this contract as it considers multiple factors on which to base the award decision.

I am requesting the Intent to Award on Solicitation Number USC-IFB-1528-RB be suspended or cancelled and be reconsidered based on the arguments provided in this protest. The options available for relief are:

Option 1: Award the contract to Palmetto Mortuary Transport based on our proven evidence to be responsible and the best value for the state in performing the requirements of USC / SOM. If this is not possible under the SC Code of Laws then utilize Option 2.

Option 2: Cancel the existing solicitation as defined in SC Code of Laws Subarticle 5, Section 11-35-1710 and issue a new solicitation based on Section 11-35-1528: Competitive Best Value Bidding. This should include the qualification of prospective offerors.

Thank you for your consideration in this matter. I look forward to an opportunity to further discuss this matter.

Sincerely,



Donald J. Lintal  
President

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